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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. HENRY REYES ESCARSEGA, Defendant and Appellant.	C065465 (Super. Ct. No. SF110946A)

After the partial denial of a *Pitchess* motion for access to police personnel records (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531), and the denial of a suppression motion, defendant Henry Reyes Escarsega pled guilty pursuant to a plea agreement. The agreement called for a stipulated sentence and the dismissal of some charges, in exchange for guilty pleas to possession for sale of methamphetamine and child endangerment, and admissions to a prior strike and service of a prior prison term. (Health & Saf. Code, § 11378; Pen. Code, §§ 273a, subd. (a), 667, subds. (b)-(i), 667.5, subd. (b), 1170.12.) The trial court sentenced

defendant to prison for the stipulated term, 10 years and 4 months, and defendant timely appealed.

On appeal, defendant (1) challenges the denial of his suppression motion, (2) challenges the partial denial of his *Pitchess* motion as to one peace officer, and (3) asks this court to review the records of another peace officer in camera.

We shall uphold the denial of the suppression motion based on the existing record, but conditionally reverse with directions to conduct further proceedings regarding defendant's *Pitchess* motion.

BACKGROUND

Defendant's appellate contentions seek review of rulings on two motions that were factually supported in part by the same eight-page police report, which we summarize here. We will summarize additional facts particular to each motion, *post*.[1]

According to the report of Officer Frank McCutcheon, he and Officer Paul Huff went to an address in response to reports of narcotics sales. They saw children "coming and going" from the "west" door, and saw defendant and others using that door, which was open and which the officers approached. At that point, Officer McCutcheon "could smell the strong odor of Marijuana coming from the open west door" and "saw Escarsega standing just inside the open front door holding a suspected narcotics bindle in his right hand. Escarsega looked at us and raised his right

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[1] The stipulated factual basis for defendant's plea was contained in the preliminary hearing transcript.

hand towards his mouth. We [ordered] Escarsega to drop the suspected narcotics bindle as we entered the apartment. Officer Huff attempted to stop Escarsega from getting the suspected narcotics bindle into his mouth. Escarsega's girlfriend [Lavender] Hughes attempted to push us away from Escarsega. Escarsega managed to get the suspected narcotics bindle into his mouth and swallow it. Escarsega was identified and found to be on parole and found to be living there with Hughes and the children. Suspected crystal methamphetamine and marijuana was found within the [children's] reach, [as well as] a scale, and U.S. currency."

The officers had been directed to investigate "835" West Fremont, and although the *front* of the house was marked "835," the number "837" was on a post near the *west* door. Various inculpatory items were found on defendant's person and in his residence.

DISCUSSION

I

Suppression Motion

A. Background

After the partial denial of his *Pitchess* motion (discussed more fully in part II, *post*), defendant moved to suppress the evidence found in his residence.[2]

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[2] At the preliminary hearing, former codefendant Lavender Hughes moved to suppress the evidence, but defendant did not join in her motion. Hughes is not a party herein, and we dismissed her separate appeal (C065070) on September 15, 2010.

At the suppression hearing, Officer McCutcheon testified he had extensive experience with narcotics investigations and the packaging of narcotics. He testified that on February 4, 2009, at about 7:40 p.m., he and his partner, Officer Huff, went to 835 West Fremont because Detective Fritts told them about narcotic sales there. They watched the front, or south side, of the house, and could see children coming and going from a door leading to a porch on the west side. He thought he saw "835 on the front of the residence" and identified photographs indicating the number "835" in one place, and "837" in another.

After about 30 minutes to an hour, the officers walked up the driveway, and then went to the door on the west side, where Officer McCutcheon "could smell the strong odor of marijuana." While on the porch, Officer McCutcheon could see into the house, and saw defendant standing "in the doorway, within a few feet of the doorway." The door was wide open, and defendant had a white plastic bindle in his hand, which appeared to be "crystal methamphetamine or rock cocaine." As defendant tried to eat the bindle, the officers entered, ordered him not to eat it, and tried to prevent him from doing so, but failed, partly because Hughes grabbed Officer McCutcheon.

When the officers handcuffed defendant and Hughes, Officer Huff asked defendant if he was on parole or probation, and defendant said he was on parole. The officers then searched him, and the residence. The porch had "837" written on a post, but the officers had not seen that before they saw defendant.

The odor of marijuana was not what drew them to the door of the house.

Officer Paul Huff testified, and corroborated that the officers thought they were approaching the door to "835" West Fremont and that there was an odor of marijuana.

The trial court (Lacy, J.) denied the motion.

B. Analysis

On appeal, defendant contends the officers were not "at a lawful vantage point" when they saw the suspected narcotics bindle in defendant's hand, and "no exigent circumstances" justified the warrantless entry into defendant's home.

The trial court determines the facts relevant to a motion to suppress, and we review the record to determine if those facts are supported by substantial evidence. Those facts are then measured against the applicable Fourth Amendment rules to determine if the trial court's legal conclusion was correct. (See *People v. Ayala* (2000) 23 Cal.4th 225, 255; *People v. Ruiz* (1990) 217 Cal.App.3d 574, 580.)

There is no legal issue with an officer watching a house from a public street; nor is there any issue with an officer approaching the door of a dwelling to speak to its occupant(s). Such so-called "knock and talks" are routine. (See *People v. Rivera* (2007) 41 Cal.4th 304, 308-311; *People v. Jenkins* (2004) 119 Cal.App.4th 368, 372-374.)

Defendant contends the officers did *not* approach an area accessible to the public, because "the officers had to walk past the mailbox, past the gate which blocked the front of the

residence, and finally, past the occupants of the house." But the testimony shows the gate was open and the officers "walked freely through it" to get to what reasonably appeared to them to be the front door. So far as this record shows, that is the path any legitimate visitor would have taken, and the officers were entitled to take that same route. (See *People v. Chavez* (2008) 161 Cal.App.4th 1493, 1500 [no "substantial or unreasonable departure from the normal access to the house"].) The situation here is not analogous to those cases where officers scale fences or peer through curtains, as defendant contends. (See *People v. Camacho* (2000) 23 Cal.4th 824; *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626.)[3]

It turned out the building was a duplex, but that of itself does not make approaching the "wrong" door unlawful.

While lawfully on the porch, Officer McCutcheon saw defendant standing by the open door, holding what appeared to be a bindle of narcotics. When defendant began to try to swallow it, the officers had the right to enter to try to stop him from doing so. (See *People v. Thompson* (2006) 38 Cal.4th 811, 820-828; *People v. Seaton* (2001) 26 Cal.4th 598, 632; *People v. Ortiz* (1995) 32 Cal.App.4th 286, 290-294.)[4]

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[3] Contrary to defendant's view, the officers were not required to contact the persons outside the house, let alone seek their permission to approach the door, and there is no evidence any of them protested. Nor was the hour--nearly 9:00 p.m. by defendant's calculation--so late as be significant.

[4] We do not discuss the "plain smell" doctrine, because the legality of the search in this case does not turn on the odor of marijuana detected by the officers. (Cf. *Robey v. Superior*

Defendant contends there was insufficient proof he had a narcotics bindle, because that bindle was never found. There was testimony defendant was taken to the hospital and efforts were made to retrieve the bindle from his person, without success. But the fact that the fate of the bindle remains unknown is not dispositive to the officers' credibility as to whether the bindle ever existed. The trial court made no findings adverse to the officers' credibility.

After the officers subdued defendant (and Hughes, who had been interfering with their efforts), they asked defendant if he was on parole, and he responded affirmatively. The search of his person and residence was then lawful, because defendant's acceptance of parole encompassed a waiver of his Fourth Amendment rights. (*People v. Middleton* (2005) 131 Cal.App.4th 732, 738-739.)

Defendant's reliance on *People v. Sanders* (2003) 31 Cal.4th 318 (*Sanders*), is misplaced. In *Sanders*, our Supreme Court held a search was unlawful because officers initially searched a residence *before* they learned an occupant was on parole. (*Sanders, supra*, 31 Cal.4th at pp. 322-324.) As the Supreme Court later noted, *Sanders* and another case held "a search cannot be validated by the discovery, after the fact, that the defendant was subject to a probation or parole search condition. [Citation.] 'This is so, we reasoned, because "whether a search

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Court, formerly at 200 Cal.App.4th 1, review granted January 18, 2012.)

is reasonable must be determined based upon the circumstances *known to the officer when the search is conducted*."'" (*People v. Brendlin* (2008) 45 Cal.4th 262, 272-273 (*Brendlin*).)

Here, the officers entered to prevent the destruction of evidence, handcuffed defendant after Hughes interfered, but did not search defendant or the residence until *after* learning he was on parole. (See *Brendlin*, *supra*, 45 Cal.4th at p. 273 [deputy "never relied on any search condition, and no search in fact occurred until the deputy discovered an outstanding warrant"].)

Accordingly, the trial court properly denied defendant's suppression motion.

II

Pitchess Motion

A. Background

After he was held to answer, defendant was charged by information with possession for sale of methamphetamine (Health & Saf. Code, § 11378), child endangerment (Pen. Code, § 273a, subd. (a)), resisting a public officer (Pen. Code, § 148), and destroying evidence (Pen. Code, § 135), and various prior convictions were alleged.

Defendant moved to discover the personnel records of Officers Huff and McCutcheon, and Detective Fritts. When the trial court indicated his supporting affidavit was insufficient, defense counsel filed an amended affidavit. Defense counsel's moving papers argued that, as to the resisting arrest charge against defendant, incidents of excessive force by either

officer would be relevant, and incidents of dishonesty would be relevant to attack the claim by the officers that they saw defendant attempting to destroy what appeared to be a narcotics bindle--a bindle that never again "surfaced," despite medical intervention--and the defense theory was that defendant did not "possess narcotics, resist the officer, or destroy evidence."

The City of Stockton opposed the motion on behalf of its peace-officer employees.

The trial court (Sueyres, J.) denied the motion as to Officer Huff and Detective Fritts, but after an in camera review of Officer McCutcheon's file, ordered all but one incident therein to be disclosed.

On appeal, defendant challenges the denial of the motion as to Officer Huff, and asks this court to review the materials pertaining to Officer McCutcheon, to see if additional materials should have been disclosed. Defendant does not seek review of the ruling as to Detective Fritts.

B. Legal Standards

The trial court (Orcutt, J.) denied defendant's request for a certificate of probable cause.[5] However, where, as here, a defendant's *Pitchess* motion is "'directed to'" the legality of a search, a challenge to the *Pitchess* ruling is cognizable on

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[5] We denied defendant's petition to compel the issuance of a certificate of probable cause, and the California Supreme Court denied review of our order. (See *Escarsega v. Superior Court* (C065631).) Defendant did not need a certificate to raise the suppression issue discussed in part I, *ante*. (See Pen. Code, § 1538.5, subd. (m); Cal. Rules of Court, rule 8.304(b)(4).)

appeal pursuant to Penal Code section 1538.5, subdivision (m), providing for review of suppression motions notwithstanding a guilty plea. (*People v. Collins* (2004) 115 Cal.App.4th 137, 141, 148-149 (*Collins*).) Accordingly, we will consider defendant's *Pitchess* claims to the extent they are "'directed to the legality of the search.'" (*Collins, supra*, 115 Cal.App.4th at p. 149.)

To balance a defendant's right to discovery and a peace officer's right to privacy, the *Pitchess* procedures provide that the defense must first show "good cause" for discovery of peace officer records, which triggers an in camera hearing by the trial court, to determine whether any information in the records should be disclosed. (See *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 81-84 (*Santa Cruz*); Evid. Code, §§ 1043-1047, Pen. Code, §§ 832.7, 832.8.)

The defense must show "good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation[.]" (Evid. Code, § 1043, subd. (b)(3).) Our Supreme Court has described this as a "relatively low threshold" and a "relatively relaxed" standard. (*Santa Cruz*, *supra*, 49 Cal.3d at pp. 83-84.)

> "To show good cause as required by [Evidence Code] section 1043, defense counsel's declaration in support of a *Pitchess* motion must propose a defense or defenses to the pending charges. The declaration must articulate how the discovery sought may lead to relevant evidence or may itself be admissible direct or impeachment evidence [citations] that would support those proposed defenses. These requirements ensure that only information 'potentially relevant' to the defense need be brought by

> the custodian of the officer's records to the court for its examination in chambers." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1024 (*Warrick*).)

The defense need only describe a "plausible factual foundation" for the claim of "specific police misconduct that is both internally consistent and supports the defense proposed to the charges." (*Warrick*, *supra*, 35 Cal.4th at pp. 1025-1026.) This allows "courts to apply common sense in determining what is plausible, and to make determinations based on a reasonable and realistic assessment of the facts and allegations." (*People v. Thompson* (2006) 141 Cal.App.4th 1312, 1318-1319 (*Thompson*); see *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039 [trial court has discretion in ruling on a *Pitchess* motion].)

C. Officer Huff

Defendant contends he met the low threshold to require an in camera review as to Officer Huff's personnel records, because the validity of the search depended on the credibility of *both* officers at the scene, not just the officer who wrote the police report, as the trial court found. We agree with defendant.

The People view the problem *retrospectively* in their briefing: Because Officer Huff did not testify at the suppression hearing that he saw a bindle in defendant's hand, he did not corroborate Officer McCutcheon's testimony that defendant attempted to destroy narcotics.[6] Accordingly, the People argue Officer Huff's testimony was not significant to the

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[6] Officer Huff was asked about a bindle of marijuana in the residence, but not asked about the bindle of narcotics allegedly seen in defendant's hand.

suppression motion, and impeaching him would have made no difference.[7] (See *Collins*, *supra*, 115 Cal.App.4th at pp. 151-152 [upholding finding of no good cause where neither officer "was involved in the attempted visual body cavity search [by other officers] that ultimately led to the discovery of the heroin"].)

But we must view the motion *prospectively*: "We normally review a trial court's ruling based on the facts known to the trial court at the time of the ruling." (*People v. Cervantes* (2004) 118 Cal.App.4th 162, 176 [trustworthiness of statement]; see *People v. Cummings* (1993) 4 Cal.4th 1233, 1287 [severance motion].) A trial court considering a *Pitchess* motion must "apply common sense in determining what is plausible, and to make determinations based on a reasonable and realistic assessment of the *facts and allegations*." (*Thompson*, *supra*, 141 Cal.App.4th at pp. 1318-1319, emphasis added.) When we review such determination for an abuse of discretion, we must consider the "facts and allegations" as they were presented to the trial court *at the time of the motion*.

The *Pitchess* motion was brought before the suppression motion. The supporting police report indicated Officer Huff *also* observed defendant attempting to destroy a narcotics bindle, and that "Officer Huff ordered Escarsega to drop the suspected narcotics bindle" before the two officers entered to

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[7] Officer Huff testified he also smelled marijuana, but the search does not turn on that point. (See fn. 4, *ante*.) He also testified about the approach to the west door, but was not asked about anything that would indicate whether or not that approach was the normal path any visitor would take.

try to stop defendant, and that it was Officer Huff who determined defendant was on parole.[8]

Thus, Officer McCutcheon's report portrays Officer Huff as a percipient witness to key facts about the search. Evidence tending to show that Officer Huff was not truthful may have helped the defense at the *anticipated* suppression hearing. (See *Brant v. Superior Court* (2003) 108 Cal.App.4th 100, 108-109.) Evidence (if any existed) that Officer Huff had prior incidents of dishonesty or planting evidence would have been relevant in *litigating* the suppression motion. (See *People v. Hustead* (1999) 74 Cal.App.4th 410, 417; *People v. Gill* (1997) 60 Cal.App.4th 743, 750-751 [good cause shown as to officer who allegedly planted contraband].)[9]

Accordingly, we shall conditionally remand with directions to the trial court to conduct an in camera review of Officer Huff's personnel file, to determine if it contains information

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[8] The preliminary hearing testimony was similar, with Officer McCutcheon testifying it was Officer Huff who announced they were peace officers, that he "remember[ed] Officer Huff telling [defendant] not to eat the narcotics" and that it was Officer Huff who ascertained that defendant was on parole.

[9] The statutes implementing *Pitchess* contain an explicit exemption for records of officers "who either were not present during the arrest or had no contact with the party seeking disclosure from the time of the arrest until the time of booking[.]" (Evid. Code, § 1047.) The trial court properly found that Detective Fritts fell into this category, but, plainly, Officer Huff does not.

that should be disclosed relevant to the defense suppression theories.[10]

D. Officer McCutcheon

Defendant asks this court to review the in camera proceedings at which the trial court determined that some--but not all--material in Officer McCutcheon's personnel file should be disclosed to defense counsel. The People agree. We agree with the parties that this court must review the in camera proceedings to determine whether the trial court abused its discretion. (See *People v. Samuels* (2005) 36 Cal.4th 96, 110; *People v. Wycoff* (2008) 164 Cal.App.4th 410, 414 (*Wycoff*).)

Although we have reviewed the sealed *reporter's transcript* of the in camera hearing, the trial court did not retain the *records* it reviewed at that hearing, or make copies of them.

As defendant noted in his *Pitchess* motion, in *People v. Mooc* (2001) 26 Cal.4th 1216 (*Mooc*) our Supreme Court detailed the trial court's duty to make and preserve a record adequate for appellate review of a *Pitchess* motion: "The trial court should . . . make a record of what documents it examined before ruling on the *Pitchess* motion. Such a record will permit future appellate review. If the documents produced by the custodian

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[10] Because defendant lacks a certificate of probable cause, we do not consider to what extent the *Pitchess* motion should have been granted to develop evidence favorable to defendant for presentation at trial, such as a record of excessive force that might have been relevant to the resisting arrest charge. (But see *Uybungco v. Superior Court* (2008) 163 Cal.App.4th 1043, 1049-1051.)

are not voluminous, the court can photocopy them and place them in a confidential file. Alternatively, the court can prepare a list of the documents it considered, or simply state for the record what documents it examined." (*Mooc, supra*, 26 Cal.4th at p. 1229; see *People v. Prince* (2007) 40 Cal.4th 1179, 1285-1286 [record adequate for appellate review because it included "the documents that formed the basis for the [trial] court's conclusion that defendant was not entitled to the complaints"].)

At the hearing in this case, the trial court ascertained from counsel for the City of Stockton that she brought "every file that contains disciplinary items" regarding Officer McCutcheon. The trial court ordered three files to be disclosed, including defendant's own complaint against Officer McCutcheon. The trial court vaguely described a fourth file it declined to disclose, describing it as "a complaint of excessive force on an animal [that] doesn't relate to the present instance."

Pursuant to the request of the parties, on December 19, 2011, we ordered the trial court "forthwith to obtain the materials previously reviewed by the trial court in camera, and forward a copy of those materials to this court, under seal, with no copies to counsel. The material is to be provided to this court on or before January 6, 2012."

The trial court did not comply with our order. Instead, it appears the trial court sent a copy of our order to the City of Stockton. On January 20, 2012, we received a letter from the Office of the City Attorney, enclosing a copy of a letter dated

July 22, 2009--the day *after* the *Pitchess* ruling--containing a *list* of the files that were disclosed pursuant to the trial court's order. But neither the 2009 letter nor the 2012 letter describe the file that was *not* disclosed, and the list itself does not equate to "the materials previously reviewed by the trial court in camera" that we ordered *the trial court* to "obtain" and "forthwith" forward to us under seal.[11]

Thus, we have been unable to review the documents the trial court reviewed. We have been precluded from fulfilling our duty to review the file pertaining to the excluded incident, to determine whether it, too, should have been disclosed to defense counsel. The trial court's fleeting observation that the excluded complaint was a claim of animal abuse does not relieve us of our duty to review the file for two reasons.

First, procedurally, defendant is entitled to have this court "actually review[] the documents the trial court had examined in adjudicating the [*Pitchess*] motion." (*People v. Guevara* (2007) 148 Cal.App.4th 62, 67 (*Guevara*); see *Wycoff*, *supra*, 164 Cal.App.4th at pp. 414-415.) "Such a procedure is necessary to satisfy the Supreme Court's pronouncement that 'the locus of decisionmaking' at a *Pitchess* hearing 'is to be the trial court, not the prosecution or the custodian of records.' [Citation.] It is for the court to make not only the final

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11 Further, the 2012 letter is not from the same Deputy City Attorney who appeared at the in camera hearing, does not explain how the author *knows* what was presented at that hearing, and is not signed under penalty of perjury, and therefore it does not properly authenticate the purported 2009 letter.

evaluation but also a record that can be reviewed on appeal." (*Guevara*, *supra*, 148 Cal.App.4th at p. 69, partly quoting *Mooc*, *supra*, 26 Cal.4th at p. 1229.)

Second, substantively, we cannot say *as a matter of law* that an animal abuse complaint against a peace officer would never be relevant for impeachment purposes--or to show the officer's propensity for excessive force--and therefore that the gap in the record is harmless. Animal abuse may reflect a readiness to do evil and therefore reflect on a person's character for honesty. (See *People v. Campbell* (1994) 23 Cal.App.4th 1488, 1492-1495 [felony vandalism reflects moral turpitude because it contains the element of malice, which necessarily reflects a readiness to do evil]; Pen. Code, § 597 [felony animal abuse contains element of malice]; accord *In re M.* (1948) 3 I. & N. Dec. 272, 273-274 [malicious injury to property a crime of moral turpitude; "The fact that the delicti were animals, namely hogs, makes the offense no less tainted with baseness and certainly contrary to the private and social duties owing to fellow men and society in general"].) The record sheds no light on what the investigation into the claim of animal abuse, if any, revealed about Officer McCutcheon.

Therefore, without reviewing the file that was excluded by the trial court, we cannot tell if defendant's *Pitchess* rights were violated, and a remand to prepare an adequate record as to

Officer McCutcheon's excluded file for potential further review is required.[12]

DISPOSITION

The judgment is reversed with directions to the trial court to conduct an in camera inspection of the personnel records of Officer Huff. If the in camera inspection reveals information relevant to the suppression motion that should be disclosed, the trial court shall order such disclosure and allow defendant to withdraw his plea and file a new suppression motion. If the in camera inspection reveals no such relevant information, the trial court shall reinstate the judgment.

The trial court forthwith shall obtain and keep under seal a copy of the material previously reviewed as to Officer McCutcheon, in the event that our review is required on appeal from the reinstated judgment or new judgment.

DUARTE, J.

We concur:

RAYE, P. J.

HOCH, J.

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[12] Nothing in this decision should be read to excuse the trial court's failure to comply with our December 19, 2011 order. In the future, the trial court shall ensure it promptly reads and complies with this court's orders, and properly supervises court staff to ensure compliance with this court's orders.